NO. 20,099

United States
Court of Appeals
for the Ninth Circuit

JACQUES ARLEY and CHARLOTTE ARLEY, husband and wife,

Appellants,

v.

UNITED PACIFIC INSURANCE COMPANY, a Washington corporation,

Appellee.

Appeal from the United States District Court for the District of Oregon

APPELLANTS' REPLY BRIEF

MAUTZ, SOUTHER, SPAULDING, KINSEY and WILLIAMSON
STANDARD PLAZA BUILDING
PORTLAND, OREGON 97204
Attorneys for Appellee

CHARLOTTE HUNTER ARLEY
1600 SOUTH LANE
SEATTLE, WASHINGTON

GANN PUBLISHING CO., PORTLAND, OREGON 11-29-65

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Please note:

Arff v. Star Fire Ins. Co., 125 N.Y. 57, 21 Am. St. Rep. 721 (1890). was inadvertently ommitted from page 53 of Appellants' Brief.

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APPELLEE NOW URGES NEW THEORY

The insurance company brought this suit against the Arleys for fraud. No other reading of the complaint is possible ("VII" R. 17).

But at the trial and on the basis of Chaney's conduct subsequent to *January* 16, 1963, the company sought to discredit only Chaney on the theory that Chaney was then "acting" as broker for the Arleys.

On appeal the company has abandoned its reliance on Chaney's (alleged) fraud and its contention that Chaney was acting for the Arleys on January 16, 1963.

Appellee has a new theory. Appellee now says that the policy was void ab initio and therefore the company's liability must be determined by whether Chaney was in fact "acting" as broker for the Arleys "during the discussion with Mrs. Arley" on *October* 30 *or* 31, 1962. The *"alleged contract"* is void, appellee says, because Chaney failed to order it until the loss occurred. (Appellee's Br, 4, 10, 11).

Appellee's new theory undoubtedly results from the view the court seemed to take of this case. In addressing the jury at the beginning of trial, the court said:

> "United Pacific Insurance Company has brought this action to secure a declaration of rights and liabilities under a certain *alleged* insurance policy which was issued as of the date of January 12th, 1963. But the actual time of the issuance of the policy is in dispute. Although it may be dated that date there is a dispute as to the validity of the policy. (Emphasis ours).
>
> * * *
>
> *** So the issue that is to be tried out here today is whether there is any liability on the policy, and that is what the jury selected will decide." (Tr. 6, 6a).

Appellee seems to be contending that unless Chaney ordered the policy prior to the loss, the policy has no value. And if Chaney in fact did not order the policy until after the loss, then the rights of the parties have to be determined by the preliminary oral contract.

The trouble with this contention is that the policy

ears a countersignature date of "1-12-63." It is countrsigned by a duly authorized agent of the company nd by its terms it was in effect ("From: January 12, 963 To: January 12, 1966") at the time of the fire. he policy is valid on its face. It is without ambiguity. bsent fraud or mutual mistake it is entitled to the ame dignity accorded every other written contract.

Northern Assurance Co. v. Grand View Building Assoc., 183. U.S. 308, 331, 22 S. Ct. 133, 46 L. ed. 213[1]

But even if the policy had not been countersigned ntil January 17, 1963, the date Chaney said he ordred it — or February 15, 1963, the date Linda Upton aid it was typed — the policy would be valid. The tipulation which goes to the validity of this policy imply states that * * "this policy shall not be valid *nless* countersigned * *." Such a stipulation has only o do with the authenticity of the policy. It has nothing o do with the time from which the policy becomes efective. (Emphasis added)

"Countersigning merely confirms the period of liabilty set forth in the policy and gives retroactive force to the date when by its terms it becomes effective." *Oklahoma Farm Bureau Mut. Ins. Co. v. Brown,* 255 P2d 919 (Okla. 1952)

"The date from which a policy becomes effective is not necessarily determined by the date which it bears or the date of its execution or the date of its delivery * * *. It is the date from which the risk is commenced, and it is determined by the meaning of the provisions of the in-

[1] Footnotes referred to may be found in Appendix pp. i through vi.

surance contract." *Schwartz v. Northern Life Insurance Co.*, 25 F2d 555 (9th Cir. 1928).

Dillon v. General Exchange Ins. Corp., 60 S.W. 2d 331, (Tex. 1933), *National Union Fire Ins. Co. v. California Cotton Credit Corp.* 1935, C.A. 9th 76 F2d 279, cited in ANNO: Insurance Policy — Counter-signature, 22 ALR 2d 984.

Appellee by the position it now urges necessarily admits the record is devoid of fraud and that the insurance company has failed to make its case. This does not now give appellee the right to ignore the policy.

The policy is valid. In replying further appellants intend no departure from this position.

Roger Chaney Was Appellee's Agent As A Matter Of Law

Assuming argunedo the insurer were not estopped to raise the issue of Chaney's agency, the statutory law of Oregon forbids it.

The insurer is estopped because (1) it stated as its ground for denying liability that the Arleys did not request coverage until after they knew fire had destroyed their property. It may not now rely on another ground *Ward v. Queen City Ins. Co.* 68 Or. 347, 138 Pac 1067, 1068,

The insurer is estopped because (2) the policy issued was produced through the office of its authorized agent, Larry Nelson. *Schoener v. Hekla Fire Ins. Co* 7 N.W. 544 (Neb.), *Shook v. Retail Hard. Mut. Fi Ins. Co.*, 134 S. W. 589, (Mo.).

But the statutes are controlling. The Supreme Court on certiorari from the Ninth Circuit in Stipcich v. *Metropolitan Life Ins. Co.* 277 U.S. 311, 48 S. Ct. 512, 72 L. ed. 895 (1927) held that the question of agency "must be resolved in the light of the Oregon statutes" and that the obvious purpose of the statutes was "to require the company to provide some agency within the state with which the insured may safety deal in matters relating to his application." *Northwestern Mut. Life Ins. Co. v. Cohn Bros.*, 102 F2d 74 (9th Cir. 1939).[2]

Chaney's Acts Were Ex Parte

Appellee places its case almost entirely on the ex parte acts of Chaney in attempting to broker coverage. These acts were not only *prior to the time Chaney told Mrs. Arley she was covered,** but IT IS ILLEGAL IN THE STATE OF OREGON FOR AGENTS TO SPLIT COMMISSIONS.

ORS 736.620 requires that every policy shall bear on its face the premium to be paid. It then provides in part that no insurance agent shall pay any part of his commission, subject to penalty and loss of license. A comprehensive analysis of "brokerage" under laws similar to Oregon's is found in *O'Neal v. Schneider* 145 F. Supp. 120, 126 (Ark. 1956).[3]

See: 11 *Op. Atty-Gen.* 361, 1922-24 construing *I.L.* 6362, now *ORS* 736.620 as not precluding *non-resident brokers* from sharing commissions with other agents.

Appellee has misstated the evidence on which appellee so strongly relies to convert Chaney into a broker for the Arleys.

> "Of course the company could not make their agent also the agent of the insured, unless the insured chose to recognize him as his agent * * to attempt to dignify a situation of this sort into a real agency for the insured is wholly unjustifiable, both in law and fact, and is rather calculated to change the honorable charter of the cause *into a snare for the unsuspecting.*" *Beebe v. Hartford M. F. Ins. Co.,* 25 Conn. 51, 65 Am. Dec. 553. (Emphasis added).

*Appellee says (Br. 6, 7): *"After the conversations with the Arleys in the fall of* 1962, *Chaney atttempted to broker the insurance coverage through other sources"* Reference to the transcript in the same order set out by appellee indicates, however, that the time was *not* in the fall of 1962, but in each instance the times are respectively stated to be: "early summer of '62" (Tr. 13); "summer of 1962" (Tr. 69-71); "July or August of '62" (Tr. 124,125). Appellee also says that "Chaney advised Mrs. Arley that he did not have a Nevada license but that they would attempt to broker the insurance for her." (Tr. 105). Reference to the transcript shows that what was read into the record was a portion of a recorded statement taken from Chaney by the company on March 21, 1963. Chaney said that:

> "in the latter part of 1961 or the early months of 1962," he told Mrs. Arley that he "would write

it * * as we had before. I then found that we did not have a Nevada non-resident's license, which I informed her of *but assured her that I would get it taken care of.*" (Emphasis added)

Q. Now, after you learned that you no longer had a nonresident Nevada license, what became of your intent to write the coverage then?

A. I informed her of the fact that we did not and I said I would have to see what else I could do because it would probably have to be brokered or we would have to take out another license. I had learned of a different commission structure, and this was the reason that I didn't immediately order the nonresident license or have Mr. Nelson do so.*"

Assuming this evidence to be competent and taking to be true (in 1961 and early 1962 Nelson had a onresident license (Tr. 11), all of it having occurred *rior to October* 30 *or* 31, 1962, the time when Chan- *y* told Mrs. Arley she was covered (Tr. 90), and *rior to December,* 1962, when Chaney again told Irs. Arley she was covered (Tr. 92, 93), it is as noth- g.

Appellee also says that Larry Nelson "specifically structed Chaney that he could not write the coverage r the Arleys" (Tr. 13, 70). There is nothing in the cord to show that Nelson advised the Arleys that haney could not bind the company.

* *

"I shall assume that the agent departed from his instructions. * * * This hypothesis will not aid the defendants. Haymer was a general agent * * and acted within the general scope of

authority in taking this risk. Although he must answer to his principals for departing from their private instructions, *he clearly bound them so far as third persons, dealing with him in good faith are concerned.* * * This rule is necessary to prevent fraud, and encourage confidence in dealings * * the plaintiff had a right to believe that the defendants reposed unlimited confidence in Haymer in relation to the subject of his agency, and *it would be a monstrous doctrine to hold that they may now discharge themseves by setting up their private instructions, which were wholly unknown to the plaintiff when he entered into the contract." Lightbody v. No. American Ins. Co.*, 23 Wend. 18 (1840) (emphasis added).

Universal Ins. Co v. Kruse, 306 F2d 661, 665 (9th Cir. 1962).

There is nothing in the record to indicate that Chane at any time in all of this period ever held himself ou to be anything but what he was: An Insurance Agen

Case Law Does Not Support Appellee's Statement

Appellee states that "It is well established in th State of Oregon that a general insurance agent may a as an agent or broker on behalf of an insured." (Br. 7 To support this statement appellee cites and quot from *Hamacher v. Tumy*, 222 Or. 341, 352 P2d 49 (1960) and *Rodgers Insurance Agency v. Anders Machinery*, 211 Or. 459, 316 P2d 497 (1957). In each case the quoted material merely states a gene proposition of insurance law—not Oregon law. Te quotation from *Rodgers* reads:

> "*The law appears to be well settled that* an insurance agent or broker who for a consideration agrees to procure insurance for another will be liable for any damage resulting from an unjustifiable breach of the agreement." (emphasis denotes omission by appellee)

Neither case was a suit against an insurer on a contract of insurance. Each was a suit against an agent for his *negligent failure to procure insurance* and this distinction was made (*Hamacher, page* 349.) The court was not called upon in either case to decide whether in Oregon an agent may act for the insured. What the court had to decide in the *Rodgers* case the court stated in the course of the opinion in *Hamacher* (p. 348):

> "The Rodgers case simply holds that the insurance agent is not liable for failure to procure insurance unless the parties agree upon the type of insurance which is to be procured. The case may also be regarded as standing for the elementary legal proposition that a contract will not arise until there is sufficient certainty in the proof of its terms."

In *Hamacher* what the court had to decide was "the character of the evidence which must be adduced by the plaintiff in order to establish the contract out of which the defendant's duty arises."

Neither case is pertinent.

Prior even to the Code case law in Oregon held that the local agent of an insurance company who solicits business for his principal and *prepares an application or a policy,* is the agent of the company, and his mis-

takes are its mistakes. *Brugger v. State Inv. Ins. Co.,* Case No. 2,051; *Hardwick v. State Insurance Co.,* 20 Or. 547, 26 Pac. 840; *McElroy v. British American Assurance Co.,* 94 Fed. 990 (9th Cir. 1899). See also *Jackson v. New York Life Ins. Co.,* (D.C. Or.) 299 Fed. at 679.

Appellee comments that because Chaney did not hold a nonresident license he was not acting for the company. Chaney was licensed under the Insurance Law of Oregon and under Oregon law he could act only for the company.

The Policy Is Valid

> "There is no suggestion that the preliminary contract in this case was not made in perfect good faith on both sides * * *." The credit allowed for the payment of the premium was an indulgence which the agents were authorized by general usage to give. Its allowance did not impair the preliminary contract; that, being valid, could have been enforced in a court of equity against the company; and having been enforced by the procurement of a policy, an action could have been maintained upon the instrument, or the court in enforcing the execution of the contract might have entered a decree for the amount of the insurance. But no resort to a court of equity for specific performance was necessary in this case by reason of the agents in filling up the blank policy, which was duly attested, as they should have done immediately after the preliminary arrangement with the assured. *The agents were authorized to do after the fire that which they had previously stipulated to do on behalf of the company.* The original neglect to fill up the blank

> policy at once constituted no valid reason for further delay. If the policy filled up at once would have bound the company, so must the policy subsequently filled up. The relations of the parties and the obligations of the company were not changed by the neglect of the agents. The filling up of the policy was a voluntary specific performance of the preliminary agreement. (Emphasis added)

This language from *Insurance Company v. Colt,* 87 U.S. 560, 20 Wall. 560, 22 L.ed. 423 (1874) could not be more appropriate. For all practical purposes it is this case. In *Colt,* however, the policy was "filled up" *upon the request of the insured.* The company knew nothing of the matter until after the loss. After consultation with their agent the insurer refused delivery of the policy.

The agent could have "filled up" the policy in this case except, the property being in Nevada, it was necessary that a Nevada agent countersign it. This made it necessary to have the policy processed through the branch office of United Pacific which happened to have an office in Portland. It is out of this fact difference that this insuer seeks still some other means to escape liabilty. But until the company knew of the loss it was glad to have Chaney write the business. The fact is the company was so glad it tried to get a Nevada license quickly enough so their local agents could share in the commission. (Pl's. Ex. 8, Tr. 156, 157). And until the company knew the full extent of the loss it treated the policy as good.

"There can be no doubt that the defendants would have considered the policy good if the fire had not occurred on the 14th of March, 1860, and that by its terms it would have related back so as to cover the risk from the 9th of February. We can perceive no justice in allowing the company to say that the policy would have been binding and valid from the ninth day of February, if no fire had occurred, but that it is void and of no effect because a fire took place on the 14th of March thereafter. When the defendants accepted the premium and delivered the policy, the agreement to insure was complete and executed, and related back to the 9th of February 1860, and *the insured was under no legal or moral obligation to notify the company that the building had been burned.* * * (emphasis added) *Keim v. Home Mut. Fire Ins. Co.,* 42 Mo. 38, 97 Am. Dec. 291, 293.

The Risk Had Been Bound.

Appellee argues this case (Br. 10, 11) as though Roger Chaney had not bound the risk. When Chaney told Mrs. Arley she was covered—and even on redirect examination Chaney insisted: *"I had told Mrs. Arley that she was covered."* (Tr. 100), coverage was bound. That no policy was ordered until after the loss is immaterial.

It is no defense that a policy is issued subsequent to a loss if by its terms the risk is to commence from a time past. When the terms are clearly expressed courts may not alter them. *Hallock v. Ins. Co.,* 26 NJ Law 268, 284.

> "Where a risk is to commence previous to the date of the policy, and the property is destroyed before the policy is actually executed and delivered, if there is no fraud or concealment by the party insured, the company will be as much bound as if the loss occurred after delivery of the policy." *Ins. Co. v. Hallock*, 27 NJL 647 (1858)

None of the cases cited by appellee is pertinent. None touches this case. Most go to the proposition that a broker who represents more than one company, and who, without authority from the insured and without the knowledge of the insured cancels a policy in one company and writes a substitute policy in another company, fails to make a valid contract if the second policy is not accepted by the insured prior to the loss.

In support of the same proposition appellee quotes from Section 9163, 16 *Appleman Insurance Law Practice*, p. 703. The entire section reads:

> "An agent of an insurance company generally has no authority to bind his principal by attempting to insure property already destroyed. The filling in and delivery of a policy on property known to be already destroyed cannot be treated as a ratification of a prior imperfect contract to insure, ratification by an agent after knowledge of a fire being unauthorized. *But where an agent is authorized, after a preliminary contract for insurance is made by him, to fill up a blank policy duly signed and attested by the officers of the company, sent to him for the purpose, he is authorized to fill up such policy after a loss has occurred.*" (emphasis added to indicate omission by appellee)

See distinction made in *Stebbins v. Lancashire Ins. Co.*, 60 N.H. 65. 70:

> "It was not an acceptance of a proposition for a contract of insurance, *like the case of a policy issued on a previous application,* which, as in the cases cited by the plaintiff take effect upon the acceptance of the application." (emphasis added)

Also *Gambleman v. Mercantile Ins. Co. of America,* 187 F.2d 654, 657 (9th Cir. 1950).

Liability Of Insurer Is Not Affected Because Insured Does Not Know Name Of Insurance Company.

Appellee states it is "requisite to proof of an oral contract of insurance" that the insurer be named. (Br. 18, 19). Appellee is wrong. Appellee's inference that Oregon requires this proof is baseless and objectionable. No authority cited by appellee supports the statement appellee makes.

Cases contra are legion.[4]

In *Port Investment Co. v. Oregon Mutual Fire Ins. Co.,* 163 Or. 1, 94 P2d 734 (1939), the Supreme Court of Oregon said:

> "a fire insurance agent ordinarily does not represent merely one company, but several, and solicits business, not on behalf of a particular company, but on behalf of his agency, and, when he has obtained the business, uses his own judgment in placing the insurance with one or more of the companies which he represents. This not only ap-

> pears in the record in this case, but is a fact which may be judicially noticed."

In the instant case United Pacific was the *only* insurer who could write the business in Nevada; it was the *only* insurer through whom Nelson ever had a nonresident's license, and it was the *only* insurer to whom this risk could be "allocated." This, the record makes abundantly clear.

Instructions

The distinction which appellee fails to see in appellants' alternative instruction No. 3 and the language used by the court is in the difference in *dates.* (Appellants' Br. 19; Tr. 261).

The effect of the court's instruction was to prohibit the jury from finding for the appellants unless the jury found,

> "that Chaney *on or about October 30th or 31st,* 1962 * * *named the United Pacific Insurance Company as the fire insurance company that would issue the policy* * *."

On this ground alone appellant would be entitled to a new trial.

There Is In This Case No Mistake

The "mistake" of which the insurer complains is that it *believed* the property "was in existence and in good condition at the time the policy was issued"

(Br. 16, 17). Appellants notified the only agent they knew of the loss and were advised by him NO OTHER NOTICE WAS NECESSARY. (Tr. 227, 228)

When Roger Chaney ordered the policy issued, he dated his memorandum 1-17-63. (Pl.'s Ex. 8). It asked that a *fire* policy be issued effective 1-12-63. ROGER CHANEY did not prepare the policy. "The policy having been prepared by the the insurance company, its terms must be construed against it and it must be held bound by them." *Hill v. Industrial Accident Commission,* 51 P2d 1126 (Cal. 1953).

> "Had they undertaken to insure from and after the making of the policy no action could have been maintained for a prior loss but the company having unequivocally taken the risk of a fire having occurred subsequent to the time specified, and having received the premium for so doing, *cannot allege that they have acted under a mistake." Insurance Co. v. Hallock,* 27 NJL 647, 655. (Emphasis added).

In *Bankers Lloyds v. Montgomery,* 42 S.W. 2d 285, (Tex. 1931), in a similar fact situation dealing with compensation insurance, the insurer sought to defend on the ground that the policy having been issued subsequent to the loss, it could now prove the agent lacked authority to bind the company. The court held the insurer was charged with knowledge that an injury may have occurred and that any such defense was foreclosed.[5]

In *Violin v. Fireman's Fund Insurance Company* (—Nev.—) 406 P.2d 287, 290 (1965), the insured falsely represented that no company had cancelled him. In fact Fireman's had itself done so four years previously and its files so showed. The insurer sued to rescind the policy and prevailed below. In reversing the decision of the trial court, the Supreme Court of Nevada held that the insurer was chargeable with actual notice as *a matter of law* and the company had waived its power to rescind the contract. The court said:

> "Specifically we hold that the insurer waived its power to rescind the insurance contract by issuing the policy with knowledge that the insureds had fraudulently misrepresented a material fact in their application for insurance."

See also: *Day v. Hawkeye Ins. Co.,* 72 Iowa 597, 34 N.W. 435, 437 (1887).

Equity Jurisdiction Was Wanting

Appellants' position that the trial court could not enlarge its jurisdiction by trying appellee's suit in equity as a declaratory judgment action has been stated. (Opening Br. 28). *Commercial Casualty Ins. Co. v. Fowles,* 154 F2d 884 (9th Cir. 1946) citing *Aetna Casualty & Surety Co. v. Quarles,* 92 F2d 321 (4th Cir. 1937). *Ettleson v. Metropolitan Life Ins. Co.* 137 F2d 62, 65 (1943)

The cases cited by appellee are not pertinent (Br. 16). None raised the question of the court's *equity* jurisdiction.

> "Whether a suitor is entitled to equitable relief in the federal courts, is strictly not a question of jurisdiction in the sense of the power of a federal court to act. It is a question only of the merits, whether the case is one for the peculiar type of relief which a court of equity is competent to give. *DiGiovanni v. Camden Fire Ins. Assn.*, 296 U.S. 65, 68, 56 S.Ct. 1, 3, 80 L. Ed.47.

Appellants' Rights Have Been Prejudiced

This suit was brought against the appellants for fraud. Appellants' demand for jury was based on the *issue of fraud* which was the *only* issue the insurer was entitled to try in this case. Appellants' demand for jury was in their action on the policy.

In retaining jurisdiction of this case and in trying the action as one for declaratory judgment the court gave to this insurer every advantage. The insurer tried out every issue it could have hoped to raise in defense of appellants' action at law, at a time and place of its choice.

Moreover, it need not be said that a party has a right, prior to the moment of trial, to know what the trial will be. It is one kind of trial to defend against fraud. It is another *for the insured to defend*

a preliminary contract against the *failure of parties.* And under the instructions of the court, the jury could have thought this. Or the jury could have found against appellants because they thought Chaney had in fact been a faithless agent on January 16, 1963, even though the insurer now contends January 16, 1963, is not an issue in this case. Or the jury might have found against the appellants because they thought the policy was misdated. Or that if the policy was "ordered" after the fire that made it bad. See: *Rommel v. New Brunswick Fire Ins. Co,* 8 N.W.2d 28 (Minn. 1943)

"This case is an illustration of the confusion and uncertainty which (was) occasioned by permitting the introduction of parol evidence to modify (the) written contract(s) * *. *Northern Assurance Co. v. Grand View Building Assoc.,* supra, 183 U.S. 308, 364.

The error in the court's failure to make findings also brings this case squarely within the views expressed by Pope, Circuit Judge in *United Press Associations v. Charles,* 245 F2d 21, (9th Cir. 1957).

CONCLUSION

The trial court was without jurisdiction to try appellee's suit in equity. In hearing the case as one for declaratory judgment the court exceeded its jurisdiction and in effect has deprived these appellants of their day in court.

The matter having been tried, appellants respectfully submit that on the merits the judgment of the trial court must be reversed.

Respectfully submitted,

CHARLOTTE HUNTER ARLEY
Attorney for Appellants
1600 South Lane
Seattle, Washington

APPENDIX

APPENDIX

[1]"To except policies of insurance out of the class of contracts to which they belong, and deny them the protection of the rule of law that a contract which is put in writing shall not be altered or varied by parol evidence of the contract the parties intended to make, as distinguished from what appears, by the written contract, to be that which they have in fact made, is a violation of principle that will open the door to the grossest frauds * * *. A court of law can do nothing but enforce the contract as the parties have made it. The legal rule that in courts of law the written contract shall be regarded as the sole repository of the intention of the parties, and that its terms cannot be changed by parol testimony, is of the utmost importance in the trial of jury cases, can never be departed from without the risk of disastrous consequences to the right of parties."

[2]"The meaning of the statute is clear, and one does not have to go far to ascertain the legislative intent that prompted its enactment. Obviously, one of its main purposes was to put a stop to the irritating and unjust practice indulged in by some insurers of adroitly phrasing their agency contracts in a way to bestow general powers on their agents, who come in direct contact with the public, when such powers relate to benefits flowing to the company, and to invest such agent with no power to represent the company when the benefits of the insured are involved. Such attempted aggressions frequently have been repelled by the courts of this state under the doctrine that 'an insurance company cannot make its local agent the medium through which all the benefits of a policy flow from the insured to it, and then deny that he has authority to represent it when the benefits of the insured are involved * *." *Sheets v. Iowa State Ins. Co* 1911 (Kan.) 135 S.W. 80, 84.

> "The suggestion is made on the brief of the learned counsel for the defendant that Lawson should be treated as the agent of the plaintiffs, and not the agent of the company, but this view leads to the manifest absurdity that the plaintiffs made the contract of insurance with their own agent, which is not to be entertained.
>
> * * *
>
> "The obvious intention of the legislature is to make an insurance company responsible for the acts of the person who assumes really to represent and act for it in these particulars, and to change the rule of law that the insured must at his peril know whether the person with whom he is dealing has the power he assumes to exercise, or is acting within the scope of his authority. *Schoener v. Hekla Ins. Co.*, supra (Neb.) 7 N.W. 544.

In Ins. Co. v. Chamberlain, 132 U.S. 304, 307, 10 S. Ct. 87, 33 L. ed. 341 (1889) the Supreme Court said:

> "By force of the statute he was the agent of the company. *He could not by any act of his shake off the character of agent for the company* nor could the company by any provision in the application or policy convert him into an agent of the assured. If it could, then the object of the statute would be defeated." (Emphasis added).

MacDonald v. Milwaukee Mech. Ins. Co., 167 F2d 276, 278 (7th Cir. 1948), certiorari denied:

> "The District Court would have been justified in submitting the question of Anderson's agency to the jury only if there was reason to believe that the insured had notice that defendant had revoked Anderson's authority or had limited it."

[3]"There is no law providing for the creation licensing or regulation of an insurance broker, nor is there any law for payment of a so-called brokerage by an agent in this state to another agent operating in this state. However, many other states have now and for several years have had provisions of law for licensing and regulating insurance brokers, for example California and New York, as well as one or more states adjoining this one. Operations under these laws eventually brought about the enactment of a statute of this state providing for the licensing of non-resident insurance brokers and for the division of commissions with agents in this state on a reciprocal basis * *. Then, too, the word 'broker' has occassionally slipped into Arkansas Statutes introduced as uniform laws, copied from the laws of other states which have legally qualified and acting brokers— * * *. As used in these Acts, the term 'broker' is, of course meaningless. It is doubtless that the appearance of the term in those statutes has confused or misled anyone."

* * *

"I must point out that there is nothing in the record * * to establish that the Insurance Commission * * has interpreted the law to mean that any insurance agent of one company is duly authorized to broker insurance through the agent of another company and receive the commissions thereon. Such an interpretation would make a mockery of the whole framework of the law governing insurance companies and their agents."

The court under the circumstances of that case held the transactions to be "flagrantly illegal."

[4]In *Sholund v. Detroit Fire & Marine,* 172 Wn. 111, 19 P2d 395 (1933), which appellee cites (Br. 11, 18), one of the headnotes reads:

> "Agent may bind fire insurer to risk by oral contract to insure without disclosing company to insured."

See: *United States Fidelity & Guaranty Co. v. Goldberger,* 13 F2d 779 (Cir. 3, 1926)

> holding Insurer's liabilty for loss occurring before execution of policy is unaffected by insured not knowing with which company he was dealing when agreeing with the agent for insurance."

Aetna Ins. Co. of Hartford, Conn. v. Licking Valley Milling Co., 19 F2d 177, 180 (Cir. 6, 1927),

> the court held the insurer was liable on the doctrine of undisclosed principal (no knowledge by insured of company until after loss).

Fireman's Fund Ins. Co. v. Leftwich, 90 SW2d 497 (Ark. 1936)

> "Since these policies were actually issued by the duly authorized agent of appellants, the argument that (the agents) represented other insurance companies is beside the question. An actual designation was made of appellants by those in authority and we prefer to deal with reality instead of conjecture."

Guipre v. Kurt Hitke & Co., 240 P2d 312, 317 (Cal. 1952)

> "There is evidence here which shows that Kurt Hitke Co. * was general agent for only one automobile insurance company writing" (that type of insurance).

Durbin Paper Stock Co. v. Watson-David Ins. Co., 167 So. 2d 34, 36 (Fla. 1964)

> "This is not a question of an undisclosed principal. Here the plaintiffs did not know the exact identity of the principal, but they knew that a principal existed, in that they did not intend for the agent to insure their building. They intended for the agent to act as an agent, not a principal, and obtain insurance for them from a third party."

> [5]"Whether Cox had any authority or not to bind the company to an agreement that the insurance should be in force from the time he took the informal application, the subsequent issuance of the policy, in effect, expressly so providing, eliminated any question of that agent's authority, or the materiality thereof."
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> * * *
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> "The insurer, in directing Cox as its agent to deliver the policy, which expressly covered a liability for any time subsequent to one minute after 12 o'clock a.m., August 31, 1929, was charged wth knowledge that an injury may have occurred and a consequent liability already accrued. It had the means of protecting itself against that possibility by directing an investiga-

tion to ascertain if such was the fact, and if found to be so, in declining to deliver the policy. Had that course been pursued, then the authority of Cox would have become a very material inquiry. But, as we have already said, as we view it, that question has been rendered immaterial.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CHARLOTTE HUNTER ARLEY
Attorney for Appellants